Samsung C&T Corp UEM Construction JV Sdn Bhd v Global Wall (M) Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(C)-857–05 OF 2023, W-02(IM)(C)-858–05 OF 2023 AND W-02(IM)(C)-859–05 OF 2023

CHE MOHD RUZIMA, AHMAD ZAIDI IBRAHIM AND AZIZUL AZMI ADNAN JJCA

28 AUGUST 2024

Civil Procedure — Injunction — Injunction to restrain — Injunction to restrain calling of performance bond — Application for undertaking as to damages — Whether there was prima facie evidence of fraud or unconscionability — Whether injunction to restrain calling of performance bond ought to be granted — Whether injunction was interim in nature — Whether undertaking as to damages ought to be granted considering that injunction was interim in nature — Arbitration Act 2005 s 11

The appellant was the main contractor for a construction project whereas the respondent was appointed by the appellant as the sub-contractor of the said project. The respondent had provided the appellant with a bank guarantee as a performance bond to secure the respondent's performance of its obligations under the subcontract. Disputes arose between the parties in relation to the call on the performance bond by the appellant which led to the following appeals by the appellant: (a) Appeal No 857 was against the High Court's decision to allow an injunction to restrain the appellant from making a call on the performance bond; (b) Appeal No 858 was against the High Court's decision to dismiss the appellant's application to set aside the injunction that had been entered on an ex parte basis; and (c) Appeal No 859 was against the High Court's decision in dismissing the appellant's application in encl 15 for an order of fortification, requiring the respondent to pay the sum of RM9,240,000 into a solicitors' joint account as security for the respondent's undertaking as to damages. Following the determination of the above appeals, the respondent made an application in encl 158 in Appeal No 859 to amend the Court of Appeal's order in Appeal No 859 with the insertion of the following words: '… sekiranya Tribunal Timbang Tara dalam Timbang Tara sedia ada antara pihak-pihak menentukan bahawa injunksi itu tidak sepatutnya diberikan;'.

Held, dismissing Appeal Nos 857 and 858 with costs of RM10,000 for each appeal, and allowing Appeal No 859 in part with costs of RM10,000:

(1) Following the decision of the Federal Court in *Sumatec Engineering and Construction v Malaysian Refining Co* [2012] 4 MLJ 1, it was settled law

that, if there existed prima facie evidence of fraud or unconscionability, the court may validly restrain a beneficiary of a performance bond from making a call on the bond, or where the call had already been made, from receiving the proceeds of such performance bond. In the present case, the appellant made a demand for approximately RM16.3m under the bank guarantee very shortly before the decision of the High Court was to be delivered to enforce an adjudication decision that the respondent had obtained against the appellant. The circumstances surrounding the making of the demand in this case supported the conclusion that there existed a seriously arguable and realistic inference of unconscionability on the facts of the present case. The court was accordingly satisfied that the court below was correct to have granted the injunction prayed for by the respondent (see paras 3–6).

(2) It was trite law that an undertaking as to damages would ordinarily be ordered of a party where that party had successfully obtained an interim injunction. However, no undertaking in damages would be ordered if the injunction was final in nature: see *Fenner v Wilson* [1893] 2 Ch 656 (see para 20).

(3) In Appeal No 859, the appellant had appealed against the dismissal of its application for fortification. An order for fortification was predicated on the existence of an undertaking in damages. In the court's view, the fact that the appellant appealed against the dismissal of its order for fortification had put into the issue the question of the undertaking in damages. The court in the present appeal had dismissed the application for fortification but directed that an undertaking as to damages be recorded as against the respondent. The court found that the entire originating summons commenced by the respondent was interim in nature, pending final determination of the merits of the respective parties' contentions in arbitration proceedings. It followed therefore that it would be entirely appropriate for the grant of the injunction to be made subject to an undertaking in damages. That the originating summons was only interim in nature was clear from the express words employed by s 11 of the Arbitration Act 2005, which permitted a party to apply to the High Court for 'any interim measure' to, among others, prevent the other party from taking action that would cause harm or prejudice to the arbitral process (see paras 19, 23–24 & 26).

(4) The court was of the view that the proposed insertion of words in encl 158 were not only unnecessary but inappropriate in the circumstances, for the following reasons: (a) it was already understood that the liability under the undertaking would crystallise once the final merits of the dispute between the parties were determined in the arbitration proceedings; and (b) it was questionable whether the arbitrator would be seized with the jurisdiction to determine whether the injunction had

been appropriately granted, as the scope of the arbitrator's jurisdiction would be governed by the arbitration agreement comprised within the subcontract (see para 29).

[Bahasa Malaysia summary

Perayu merupakan kontraktor utama bagi satu projek pembinaan manakala responden dilantik oleh perayu sebagai subkontraktor bagi projek tersebut. Responden telah memberikan jaminan bank kepada perayu sebagai bon pelaksanaan untuk menjamin pelaksanaan oleh responden terhadap obligasinya di bawah subkontrak tersebut. Pertikaian timbul antara pihak-pihak berhubung dengan panggilan bon pelaksanaan oleh perayu yang membawa kepada rayuan-rayuan berikut oleh perayu: (a) Rayuan No 857 adalah terhadap keputusan Mahkamah Tinggi yang membenarkan injunksi untuk menghalang perayu daripada memanggil bon pelaksanaan tersebut; (b) Rayuan No 858 adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu untuk mengenepikan injunksi yang telah dimasukkan secara ex parte; dan (c) Rayuan No 859 adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu dalam lampiran 15 untuk perintah fortifikasi, yang menghendaki responden membayar jumlah RM9,240,000 ke dalam akaun bersama peguam sebagai jaminan untuk aku janji responden mengenai ganti rugi. Berikutan penentuan rayuan-rayuan di atas, responden membuat permohonan dalam lampiran 158 dalam Rayuan No 859 untuk meminda perintah Mahkamah Rayuan dalam Rayuan No 859 dengan memasukkan perkataan-perkataan berikut: '... sekiranya Tribunal Timbang Tara dalam Timbang Tara sedia ada antara pihak-pihak menentukan bahawa injunksi itu tidak sepatutnya diberikan;'.

Diputuskan, menolak Rayuan No 857 dan 858 dengan kos sebanyak RM10,000 bagi setiap rayuan, dan membenarkan sebahagian Rayuan No 859 dengan kos sebanyak RM10,000:

(1) Berikutan keputusan Mahkamah Persekutuan dalam *Sumatec Engineering and Construction v Malaysian Refining Co* [2012] 4 MLJ 1, sudah menjadi undang-undang yang mantap bahawa, jika wujud keterangan prima facie tentang fraud atau ketidakwajaran, mahkamah boleh dengan sah menghalang benefisiari bon pelaksanaan daripada membuat panggilan ke atas bon tersebut, atau apabila panggilan tersebut telah dibuat, daripada menerima hasil bon pelaksanaan tersebut. Dalam kes ini, perayu membuat tuntutan kira-kira RM16.3 juta di bawah jaminan bank sejurus sebelum keputusan Mahkamah Tinggi disampaikan untuk menguatkuasakan keputusan adjudikasi yang diperoleh responden terhadap perayu. Keadaan yang menyelubungi tuntutan dalam kes ini menyokong kesimpulan bahawa wujudnya inferens yang boleh dipertikaikan dan realistik tentang ketidakwajaran dalam fakta kes ini. Maka dengan itu, mahkamah

berpuas hati bahawa mahkamah di bawah adalah betul dalam membenarkan injunksi yang dipohon oleh responden (lihat perenggan 3–6).

(2) Adalah menjadi undang-undang mantap bahawa aku janji mengenai ganti rugi lazimnya akan diperintahkan ke atas sesuatu pihak apabila pihak tersebut telah berjaya memperoleh injunksi interim. Walau bagaimanapun, tiada aku janji dalam ganti rugi akan diperintahkan jika injunksi tersebut bersifat muktamad: lihat *Fenner v Wilson* [1893] 2 Ch 656 (lihat perenggan 20).

(3) Dalam Rayuan No 859, perayu telah merayu terhadap penolakan permohonannya untuk fortifikasi. Perintah fortifikasi adalah berdasarkan kewujudan aku janji dalam ganti rugi. Pada pandangan mahkamah, fakta bahawa perayu merayu terhadap penolakan perintahnya untuk fortifikasi telah meletakkan persoalan mengenai aku janji dalam ganti rugi. Mahkamah dalam rayuan semasa telah menolak permohonan untuk fortifikasi tetapi mengarahkan supaya aku janji mengenai ganti rugi direkodkan terhadap responden. Mahkamah mendapati bahawa keseluruhan saman pemula yang dimulakan oleh responden adalah bersifat interim, sementara menunggu penentuan muktamad merit pertikaian setiap pihak dalam prosiding timbang tara. Oleh itu, adalah wajar bagi pemberian injunksi tersebut tertakluk kepada aku janji dalam ganti rugi. Fakta bahawa saman pemula tersebut hanya bersifat sementara adalah jelas daripada perkataan nyata yang digunakan oleh s 11 Akta Timbang Tara 2005, yang membenarkan satu pihak memohon kepada Mahkamah Tinggi untuk 'apa-apa langkah interim' untuk, antara lain, menghalang pihak yang satu lagi daripada mengambil tindakan yang akan menyebabkan kemudaratan atau prejudis kepada proses timbang tara (lihat perenggan 19, 23–24 & 26).

(4) Mahkamah berpendapat bahawa kemasukan perkataan dalam lampiran 158 yang dicadangkan bukan sahaja tidak perlu tetapi tidak sesuai dalam keadaan kes, atas sebab-sebab berikut: (a) telah difahami bahawa liabiliti di bawah aku janji tersebut akan menjadi nyata sebaik sahaja keputusan muktamad merit pertikaian antara pihak-pihak telah ditentukan dalam prosiding timbang tara; dan (b) adalah menjadi persoalan sama ada penimbang tara mempunyai bidang kuasa untuk menentukan sama ada injunksi tersebut telah diberikan dengan sewajarnya, kerana skop bidang kuasa penimbang tara akan ditadbir oleh perjanjian timbang tara yang terkandung dalam subkontrak tersebut (lihat perenggan 29).]

Cases referred to

Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) and others v Bosworth and others [2021] 4 WLR 72, QBD (refd)

Fenner v Wilson [1893] 2 Ch 656, Ch D (refd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (folld)

Legislation referred to

Arbitration Act 2005 s 11
Construction Industry Payment and Adjudication Act 2012 s 29

Appeal from: Originating Summons No WA-24C-13–02 of 2023 (High Court, Kuala Lumpur)

P Gananathan (with Alicia Ng Yan Ying, Shasha Chim Sim Cheng and Tan Joon Meng) (Gananathan Loh) for the appellant.
Darshendev Singh (with Chuck Siew Ka Wai and James Lau Jian Hui) (Lee Hishammuddin Allen & Gledhill) for the respondent.

Azizul Azmi Adnan JCA:

INTRODUCTION

[1] The appellant defendant before us, Samsung C&T Corp UEM Construction JV Sdn Bhd, was the main contractor for the construction of a tower complex known as Merdeka 118. The respondent plaintiff, Global Wall (M) Sdn Bhd, was a subcontractor appointed by the appellant. The respondent had provided the appellant a bank guarantee as a performance bond to secure the performance by the respondent of its obligations under the relevant subcontract.

[2] There were three appeals before us involving the same parties and the same dispute. In Appeal No 857, the appellant appealed against the decision of the High Court to allow an injunction against the appellant restraining it from making a call on the performance bond furnished by the respondent. The High Court found that unconscionability existed on the facts of the case. In Appeal No 858, the appellant appealed against the decision of the High Court dismissing its application to set aside the injunction that had been entered on an ex parte basis. Finally, in Appeal No 859, the appellant appealed against the decision of the High Court refusing the appellant's application in encl 15. The principal relief sought in this notice of application was for an order of fortification, requiring the respondent to pay the sum of RM9,240,000 into a solicitors' joint account as security for the respondent's undertaking as to damages.

[3] Following the decision of the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, it is now settled law that, if there exists prima facie evidence of fraud or

unconscionability, the court may validly restrain a beneficiary of a performance bond from making a call on the bond, or where the call has already been made, from receiving the proceeds of such performance bond.

[4] In this case the appellant had made a demand for approximately RM16.3m under the bank guarantee very shortly before the decision of the High Court was to be delivered to enforce an adjudication decision that the respondent had obtained against the appellant.

[5] The circumstances surrounding the making of the demand in this case supported the conclusion that there existed a seriously arguable and realistic inference of unconscionability on the facts of the present case. These circumstances were as follows:

(a) at the time the demand on the bank guarantee was made, the works had been validly suspended pursuant to s 29 of the Construction Industry Payment and Adjudication Act 2012;

(b) as explained above, the demand was made just two weeks before the High Court was due to deliver its decision on the respondent's application to enforce the adjudication decision, and on the appellant's application to set it aside;

(c) the demand was also made just three weeks after the appellant lost its appeal at the Court of Appeal against the decision of the High Court to refuse stay of the adjudication decision;

(d) the demand was made after the appellant had given a notice of termination of the sub-contract but without waiting for the 14-day period for notice to expire;

(e) the basis for the demand on the guarantee was only made known in the affidavit filed at the High Court, which alleged backcharges and delay and which contended that the appellant was entitled under cl 4.2(d) of the subcontract to call on the guarantee on the basis that the respondent had committed an act that entitled the appellant to terminate the subcontract.

[6] While the happening of each of the events enumerated above may by itself be reasonably explainable, we were of the view that the more-than-coincidental timing of all of them was suggestive of the lack of bona fides and unconscionability on the part of the appellant. We were accordingly satisfied that the court below was correct to have granted the injunction prayed for by the respondent.

[7] We dismissed the appeals in Appeal Nos 857 and 858, with costs of RM10,000 for each appeal.

APPEAL NO 859

[8] In connection with Appeal No 859, it will be recalled that the appellant applied to the High Court in encl 15 for an order for fortification, in order to secure the respondent's undertaking as to damages, should the injunction be granted. The appellant had prayed for the sum of RM9,240,000 to be deposited into a solicitors' joint account for this purpose.

[9] The High Court dismissed encl 15. However, when it allowed the respondent's originating summons (seeking for the injunction to restrain the call on the bank guarantee), the High Court did not record any order for the respondent to provide to the appellant any undertaking as to damages.

[10] We accordingly allowed Appeal No 859 in part only, in so far as it pertained to an order for the respondent to provide an undertaking to the appellant to pay damages that the appellant may suffer as a result of the injunction, as may be proved. We allowed costs of RM10,000 for Appeal No 859.

[11] The respondent has now appealed against the determination of the court in Appeal No 859. In these grounds, we explain the reasons for our decision.

THE ORDERS OF THE HIGH COURT

[12] In allowing the originating summons, the High Court granted the following orders:

> *ATAS PERMOHONAN* Plaintif yang telah ditetapkan untuk Keputusan pada hari ini *DAN SETELAH MEMBACA* Saman Pemula bertarikh 9 Februari 2023, Afidavit-afidavit dan Hujahan Bertulis pihak-pihak yang kesemuanya difailkan di sini *DAN SETELAH MENDENGAR* Darshendev Singh (Siew Ka Wai dan Joanne Teo bersamanya), peguamcara bagi pihak Plaintif dan Gananathan a/l Pathmanathan (Alicia Ng Yan Ying dan Tan Joon Meng bersamanya), peguamcara bagi pihak Defendan *MAKA ADALAH DIPERINTAHKAN* bahawa:
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> (1) Saman Pemula Plaintif (Lampiran 1) dibenarkan; dan
>
> (2) Defendan sama ada melalui diri mereka, atau pengarah-pengarahnya, pengurus-pengurusnya, pegawai-pegawainya, pekerja-pekerjanya, pekhidmat-pekhidmatnya, ejen-ejennya atau sebaliknya dihalang daripada menuntut Jaminan Bank Malayan Banking Berhad bertarikh 18 Oktober 2018 (No Ruj 99110BGJ6184403) dibaca bersama dengan Pindaan Kepada Jaminan bertarikh 12 April 2022 (No Ruj 99080BGJ6184403) (dirujuk secara kolektif sebagai Jaminan Bank'); dan

(3) Defendan sama ada melalui diri mereka, atau pengarah-pengarahnya, pengurus-pengurusnya, pegawai-pegawainya, pekerja-pekerjanya, pekhidmat-pekhidmatnya, ejen-ejennya atau sebaliknya dihalang daripada menerima jumlah RM16,322,799.50 (atau mana-mana bahagiannya) di bawah Jaminan Bank tersebut; dan

(4) Sekiranya sebarang jumlah telah dilepaskan di bawah Jaminan Bank tersebut, Defendan sama ada melalui diri mereka, atau pengarah-pengarahnya, pengurus-pengurusnya, pegawai- pegawainya, pekerja-pekerjanya, pekhidmat-pekhidmatnya, ejen-ejennya atau sebaliknya dihalang daripada menggunakan atau berurus dengan jumlah-jumlah tersebut sementara menunggu pengeluaran dan tertakluk kepada keputusan award terakhir dalam timbang tara; dan

(5) Defendan perlu membayar Plaintif kos sebanyak RM8,000.00 tertakluk kepada fi alokatur.

[13] At the same time, the appellant's application in encl 15 was dismissed in its entirety.

[14] It may thus be observed that the High Court did not record any undertaking as to damages from the respondent.

THE APPLICATION IN ENCL 15

[15] The appellant's application in encl 15 was for the respondent to deposit the sum of RM9,240,000 into a joint solicitors' account in order to fortify the undertaking in damages. It follows therefore that the fact that the appellant has appealed against the dismissal of its application in encl 15 has put into issue not just the refusal by the High Court of the fortification order, but also the undertaking itself, for the fortification order can only exist if an undertaking in damages has been given.

[16] If an applicant for an interim remedy is not able to show sufficient assets within the jurisdiction to provide substance to an undertaking in damages, the court may require it to reinforce the undertaking by providing security. The security to be provided is subject to the discretion of the court, and may include the payment of a sum into court or to a stakeholder.

[17] In order to obtain an order of fortification, the applicant must show a good arguable case that:

(a) it has suffered or will suffer a loss. For this purpose, there must be an intelligent estimate, being informed and realistic but not necessarily mathematically or scientifically precise or rigorous, of the likely amount of that loss which has been or might be suffered by reason of the interim injunction;

(b) the loss would not have been suffered without the making of the interim injunction; and

(c) there is a sufficient level of risk of loss to require fortification. In other words, there would be a risk of the other party not being able to satisfy an order for damages.

(See *Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) and others v Bosworth and others* [2021] 4 WLR 72.)

[18] It may further be observed that para 3 of the application in encl 15 prayed for any other reliefs that the court considers appropriate. We considered that this would include an order for the respondent to provide an undertaking in damages.

[19] As alluded to above, we dismissed the application for fortification, but directed that an undertaking as to damages be recorded as against the respondent. As the appellant has not appealed against the dismissal of its appeal, we do not consider it necessary to specifically address our reasons for doing so here. The respondent, however, has sought to assail our decision to record the undertaking, the reasons for which decision are explained in the paragraphs that follow.

UNDERTAKING AS TO DAMAGES

[20] It is trite law that an undertaking as to damages would ordinarily be ordered of a party where that party has successfully obtained an interim injunction. However, no undertaking in damages would be ordered if the injunction was final in nature: see *Fenner v Wilson* [1893] 2 Ch 656.

[21] The originating summons commenced by the respondent was for the express purpose of obtaining an injunction to restrain the appellant from calling on the bank guarantee. Once the High Court granted the orders prayed for in the originating summons, proceedings at the High Court would be at an end. In this sense, therefore, it may be said that the injunction was final in nature.

[22] However, the relationship between the parties and the disputes that have arisen between them can only be properly understood in context. The respondent had successfully obtained an adjudication award against the appellant in respect of certain interim payment claims under the subcontract that had been entered between the parties. This subcontract contained an arbitration clause. The results of the adjudication between the parties were of temporary finality only; the substantive dispute between the parties —

whether, for example, the backcharges were correctly claimed by the appellant and whether the respondent had been guilty of delay — must await final determination in arbitration proceedings.

[23] Thus properly understood, the entire originating summons commenced by the respondent was interim in nature, pending final determination of the merits of the respective parties' contentions in arbitration proceedings. It followed therefore that it would be entirely appropriate for the grant of the injunction to be made subject to an undertaking in damages. If it is finally determined that the appellant was justified in terminating the subcontract, that there were valid backcharges for which the respondent was liable, and that there was delay on the part of the respondent, the respondent should be made liable for any damages that may have been caused to the appellant by reason of the injunction having been ordered against it. It would appear to us that the measure of damages would include the interest costs on the principal sum of the bank guarantee for the period that the appellant was denied its right to receive the proceeds of the guarantee, but we make no definitive pronouncement in this respect, because this is an issue that must await final determination of the dispute between the parties.

[24] That the originating summons was only interim in nature is clear from the express words employed by s 11 of the Arbitration Act 2005, which permits a party to apply to the High Court for 'any interim measure' to, among others, prevent the other party from taking action that would cause harm or prejudice to the arbitral process.

[25] We observe that para 54 of the affidavit in support affirmed on behalf of the respondent stated that the respondent undertook to pay damages if the court subsequently finds that an injunction ought not have been granted.

[26] In summary therefore, the injunction sought by the respondent was interim in nature, having regard the circumstances of the dispute between the parties. Where an interim injunction is ordered, the applicant for the injunction would ordinarily be required to provide an undertaking in damages, unless the injustice to the applicant is so manifest to deem such an undertaking unnecessary. In Appeal No 859, the appellant has appealed against the dismissal of its application for fortification. An order for fortification is predicated on the existence of an undertaking in damages. In our view, the fact that the appellant appealed against the dismissal for its order for fortification has put into the issue the question of the undertaking in damages.

A THE NOTICE OF MOTION IN ENCL 158

[27] Following our determination of the appeals, the respondent made an application in encl 158 in Appeal No 859 to amend the order of the Court of Appeal in Appeal No 859 with the insertion of additional words so that the substantive portion of the order read as follows:

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> Rayuan Perayu adalah dibenarkan sebahagian setakat yang berkaitan dengan perintah supaya pihak Responden memberikan suatu aku janji (undertaking) kepada Perayu untuk membayar ganti rugi yang mungkin dialami oleh Perayu akibat injunksi bertarikh 15.5.2023 ('*Injunksi*'), yang diperolehi oleh Responden di Mahkamah Tinggi dengan nilai ganti rugi tersebut yang mungkin dibuktikan, *sekiranya Tribunal Timbang Tara dalam Timbang Tara sedia ada antara pihak-pihak menentukan bahawa Injunksi itu tidak sepatutnya diberikan*;

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D **[28]** The words proposed by the respondent to be inserted are those underlined in the excerpt reproduced above.

[29] We were of the view that the proposed insertion of words were not only unnecessary but inappropriate in the circumstances, for the following reasons:

E (a) first, it is already understood that the liability under the undertaking would crystallise once the final merits of the dispute between the parties are determined in the arbitration proceedings. It would thus be unnecessary for the additional words to be included; and

F (b) second and perhaps more significantly, it is questionable whether the arbitrator would be seised with the jurisdiction to determine whether the injunction had been appropriately granted, as the scope of the arbitrator's jurisdiction would be governed by the arbitration agreement comprised within the subcontract. This would be to determine the subcontract disputes. The grant of a prohibitory injunction was made pursuant to the exercise of the jurisdiction of the courts under s 11 of the Arbitration Act 2005, and the arbitrator appointed by the parties would not have any jurisdiction to determine the correctness of the decision of the High Court to grant the injunction.

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H *Appeal Nos 857 and 858 dismissed with costs of RM10,000 for each appeal; Appeal No 859 allowed in part with costs of RM10,000.*

Reported by Dzulqarnain Ab Fatar

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